No. 02-367

In The

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,

Petitioner,

v.

TERRY GEYE and BRANDON GEYE,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8

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RESPONDENTS' SUPPLEMENTAL BRIEF PURSUANT TO RULE 15.8

The purpose of this Supplemental Brief is to address a point of Texas law first raised by Petitioner American Cyanamid Company ("Cyanamid") in its Reply Brief. That point warrants correction and, indeed, must be brought to this Court's attention because it concerns this Court's jurisdiction to hear this case.

Cyanamid asserts that "[t]he court of appeals treated the subject of whether Respondents' claims are labeling-related as a factual issue," *Reply* at 2 n. 2, and that "[u]nder the Texas Constitution, this factual finding by the state court of appeals 'shall be conclusive,' and therefore, cannot be reviewed by the Texas Supreme Court." *Id.* at 3 (quoting TEX. CONST., art. V, §6(a)). Cyanamid has misconstrued the record and the law. When Cyanamid's assertions are corrected, it is clear that this Court does not have jurisdiction under the fourth exception to judgment finality set forth in *Cox Broadcasting v. Cohn,* 420 U.S. 469, 482 (1975).

Whether any of Respondents' claims are labeling-related is a question of law and was treated as such by the court of appeals. The Texas Constitution's provision "that the decision of [the courts of appeals] shall be conclusive on all matters of fact," TEX. CONST., art. V, §6(a), pertains to situations in which the issue on appeal involves a challenge to the factual sufficiency of the evidence. *See Cropper v. Caterpillar Tractor Co.,* 754 S.W.2d 646, 648-49 (Tex. 1988) (construing TEX. CONST., art. V, §6 (1891, amended 2001), and discussing the historical basis for the Texas appellate courts' "power to review jury verdicts on factual issues"). Indeed, each of the Texas cases cited by Cyanamid, *Reply* at

3, was an appeal from a jury trial. *See e.g. Herbert v. Herbert,* 754 S.W.2d 141, 142 (Tex. 1988).

This case proceeded to the court of appeals after the trial court granted Cyanamid's motion for summary judgment. "The very principle upon which summary judgments are founded is that the record presents no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *City of Grand Prairie v. City of Irving,* 441 S.W.2d 270, 273 (Tex.Civ.App.–Dallas 1969, no writ) (citation omitted); *see Kellum v. Pacific Nat'l Fire Ins. Co.,* 360 S.W.2d 538, 540 (Tex.Civ.App.–Dallas 1962, writ ref'd, n.r.e.) ("This is a summary judgment action wherein no facts are decided"). Therefore, when reviewing a trial court's summary judgment, the duty of the court of appeals "is not to decide any issues of fact." *Gevinson Associates v. Ling Elec., Inc.,* 373 S.W.2d 564, 566 (Tex.Civ.App.–Dallas 1963, no writ); *accord Garcia v. Garcia de Ortiz,* 257 S.W.2d 804, 807 (Tex.Civ.App.–San Antonio 1953, no writ). The performance of that duty is not optional, because the court of appeals "has no jurisdiction to determine originally questions of fact in cases brought there on appeal." *Wisdom v. Smith,* 209 S.W.2d 164, 166 (Tex. 1948). If, as Cyanamid maintains, the court of appeals in the present case made a "factual finding," *Reply* at 3, it would mark the first time in the history of Texas jurisprudence that an appellate court has undertaken to so act. "No appeals court in Texas has ever been given, or has ever exercised, the authority to *find* any fact." *Herbert,* 754 S.W.2d at 145 (Phillips, C.J., concurring) (emphasis in original).

The purely legal question of whether Respondents' claims are labeling-related was presented to the Texas Supreme Court, *Reply* at 3 n. 3, but the court did not reach that issue which was mooted by the court's decision based on its

interpretation of the breadth of the congressionally created exception to FIFRA preemption. Consequently, reversal of the Texas Supreme Court on the federal issue of the scope of the FIFRA preemption exception would not be preclusive of further litigation on the separate federal issue of whether any of Respondents' claims (e.g., breach of express warranty) are labeling-related. *See Cox,* 420 U.S. at 482.

For this reason, as well as those in Respondents' opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 5, 2002